No. 84-68

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1984

KERR-McGEE CORPORATION,

Petitioner,

versus

THE NAVAJO TRIBE OF INDIANS, et al.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF AMICUS CURIAE SALT RIVER PROJECT AGRICULTURAL IMPROVEMENT AND POWER DISTRICT IN SUPPORT OF THE PETITIONER

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INTERESTS OF THE AMICUS CURIAE AND INTRODUCTION

The amicus curiae Salt River Project Agricultural Improvement and Power District, a political subdivision of the State of Arizona, is the operating agent of the Navajo Project, a coal-fired electric generating plant and attendant facilities, located on the Navajo Indian reservation in Arizona. The Navajo Project is co-owned by the amicus, the City of Los Angeles, Arizona Public Service Company, Ne-

vada Power Company and Tucson Electric Power Company. [1]

The amicus is also the operating agent of the Coronado Generating Station, a coal-fired electric generating plant located off the Navajo reservation. It is co-owned by the amicus and the City of Los Angeles.

The plants are fueled in substantial part by on-reservation coal resources mined by the Peabody Coal Company, and the Pittsburgh & Midway Coal Co., respectively. To the extent that the Navajo Tribe can tax these fuel suppliers, [2] certain taxes would be passed along to the plants' owners under their coal supply contracts. The owners and their customers in Arizona, California, and Nevada can be directly affected by the outcome in this case.

The amicus urges this Court to reverse the judgment of the Court of Appeals because the opinion of the court below ignored the important role Secretarial approval plays as the only remaining check against unlawful tribal conduct and otherwise unrestrained tribal exercise of civil regulatory jurisdiction over nonmembers.

SUMMARY OF ARGUMENT

Departing from *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978), this Court upheld the power of an Indian tribe to tax a non-Indian in *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982). Critical to this Court's holding, and in response to the dissenting justices' now prophetic warning, this Court required Secretarial approval "before any tax on nonmembers can take effect." 455 U.S. at 141.

[1] The amicus holds title to 24.3% of the Navajo Project for the use and benefit of the United States.

[2] By contract, the Navajo Tribe has promised not to tax the owners and Peabody Coal Company in connection with the Navajo Project. The Tribe has twice repudiated this promise, as detailed below. No such promise has been made to Pittsburgh & Midway Coal Co. in connection with the Coronado plant.

The Ninth Circuit has now abandoned this critical precondition to a tribe's power to tax. Thus, non-Indians have no protection at all. If *Merrion* is to survive, this Court must reverse the Ninth Circuit because Secretarial approval of tribal taxing ordinances is a necessary incident of federal Indian law generally, and the Navajo treaty in particular.

ARGUMENT

I.

THE ODYSSEY OF AMERICAN INDIAN LAW

In 1868, Lieutenant General William T. Sherman, of Civil War fame, concluded a treaty of peace with the Navajo Tribe of Indians. II C. Kappler, *Indian Affairs, Laws and Treaties* 1015 (1904). Since then, this Court has charted a course in American Indian law marked by many changes of fortune. Just as the long wanderings of Odysseus were affected by changing winds, tides, and currents, this Court's development of American Indian law has been affected by historical change, currents of public opinion, and contemporary fact. [3] Adjusting the competing demands of an indigenous people with those of a new nation has not been easy. Sometimes the lower courts stay the course too long until corrected by this Court. Sometimes they stray from this Court's course prematurely, as when the United States Court of Appeals for the Ninth Circuit held that the Navajo Tribe could tax non-Indians even without the approval of the Secretary of the Interior. *Kerr-McGee Corp. v. Navajo Tribe of Indians*, 731 F.2d 597, 604 (9th Cir. 1984).

Departing from *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978), this Court decided the important question of tribal taxing power over non-Indians in *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982). Over objections that (1) non-Indians had no right to participate in tribal

[3] See *Organized Village of Kake v. Egan*, 369 U.S. 60, 72 (1962) for Justice Frankfurter's observation that notions of tribal status yield "to closer analysis when confronted, in the course of subsequent developments, with diverse concrete situations."

government, (2) federal claims could be adjudicated in tribal forums without possibility of federal judicial review at any point, and (3) tribal taxing power was not limited by constitutional or statutory constraint, this Court nonetheless upheld the power of Indian tribes to tax non-Indians. The dissenting opinion of Justice Stevens, along with the Chief Justice and Justice Rehnquist, stated with great force the genuine dangers to civil liberties created by an acknowledgement of a tribal power to tax non-Indians. This Court's answer to the dissent's recognition of these dangers was as follows:

> Of course, the Tribe's authority to tax nonmembers is subject to constraints not imposed on other governmental entities: the Federal Government can take away this power, and *the Tribe must obtain the approval of the Secretary before any tax on nonmembers can take effect.* These additional constraints minimize potential concern that Indian tribes will exercise the power to tax in an unfair or unprincipled manner, and ensure that any exercise of the tribal power to tax will be consistent with national policies.

455 U.S. at 141 (emphasis added).

The dissent characterized the Secretary's power to veto a tribal tax as a poor substitute for the "protection afforded by rules of law." 455 U.S. at 190. Now the Ninth Circuit has abandoned even this poor substitute by refusing to follow *Merrion*. The reality of unfair and unprincipled tribal taxation is illustrated by the experience of the owners of the Navajo Project with the Navajo and Hopi Indian Tribes.

The Navajo Tribe expressly promised that it would not tax them or their coal supplier. This promise is contained in the lease under which the owners operate the Navajo Project electric generating plant. And yet soon after the completion of the $611,060,000.00 project, the Tribe enacted the taxes which are before this Court and sought to apply them to the owners. The owners resisted these taxes in the United States District Court for the District of Arizona and in the United States Court of Appeals for the Ninth Circuit where, after

full briefing and oral argument, the Tribe mooted the appeal in 1981 by reaffirming its covenant not to tax.

In the fall of 1984, however, and even *after* this Court granted certiorari in this case, the Navajo Tribe again repudiated its covenants not to tax the amicus and its coowners. As this brief is being written, the amicus faces the specter of repeating the long and arduous task of resisting Navajo tribal taxation.

The Hopi Indian Tribe enacted a coal severance tax on coal mined on lands off its reservation, and thus beyond its clear jurisdiction. The plants' owners and others appealed to the Secretary from the enactment of this tax through the administrative mechanism provided by the Hopi's Indian Reorganization Act constitution and federal regulations. The Secretary of the Interior vetoed the Hopi tax as being in violation of federal law, thus proving the wisdom of this Court's requirement that before a tribe can tax it must obtain the approval of the Secretary.

After this Court's decision in *Merrion*, only Secretarial review stands between non-Indians and unlawful tribal power. Non-Indians neither vote nor participate in tribal government. And, after *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978), non-Indians have no opportunity to present their Indian Civil Rights Act claims to a federal forum. State forums have no jurisdiction. A tribal forum is no forum at all because (1) due process is absent, (2) Indian tribes do not recognize the doctrine of separation of powers,[4] and (3) there is no federal judicial review of federal questions decided by tribal forums.

All that stands between this sorry state of affairs and non-Indians is the minimal protection this Court provided when it stated that tribes *must* obtain the approval of the Secretary before any tax on nonmembers can take effect. And yet

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[4] Indeed, when a Navajo court entered a decision adverse to the Tribe, the Council immediately enacted an ordinance subjecting "judicial" decisions to further review by the Council itself. Resolution of the Navajo Tribal Council Reorganizing the Navajo Judicial System, No. CMY-39-78, dated May 4, 1978.

the Ninth Circuit has eliminated even this, at best, marginal substitute for the protection afforded by rules of law.

II.

THE NINTH CIRCUIT'S REJECTION OF SECRETARIAL APPROVAL

How was the Ninth Circuit able to slip out from under the seemingly mandatory requirement of this Court that Secretarial approval of taxing ordinances will ensure against the "concern that Indian tribes will exercise the power to tax in an unfair or unprincipled manner?" 455 U.S. at 141. It did this because no federal statute expressly requires Secretarial approval before the imposition of a tribal tax. The Ninth Circuit held that Secretarial approval was required "only of those tribes that have chosen to include such a requirement in their constitutions, by-laws, or charters." 731 F.2d at 604. In a very real way, the Ninth Circuit has stripped this Court's answer to the genuine concern expressed by the dissenting Justices in *Merrion*.

A six-member majority of this Court was willing to uphold tribal taxation of non-Indians because they were persuaded that Secretarial review would protect non-Indians from the dangers exposed by the three-member dissent. The Court now has two choices: (1) it can reverse *Merrion* as a decision resting on a fundamental misapprehension of the existence of Secretarial protection; or, (2) it can hold that because Secretarial approval of tribal taxing ordinances is a necessary implication of the Congressional scheme for Indian tribes and a necessary incident of their dependent status, the failure of the Navajo Tribe to adopt Congressionally imposed conditions deprives it of the power to tax petitioner.

We do not re-argue *Merrion* here. The dissenting opinion shows the way. We do chart the course for a finding that Secretarial approval of tribal taxing ordinances is a necessary incident of federal Indian law generally, and the Navajo treaty itself.

III.

SECRETARIAL APPROVAL OF TRIBAL TAXING ORDINANCES IS A NECESSARY INCIDENT OF FEDERAL INDIAN LAW GENERALLY, AND THE NAVAJO TREATY IN PARTICULAR

A. *Secretarial approval as a pervasive element of federal Indian law.*

Merrion's conclusion that all Indian tribes, not just some tribes, must obtain the approval of the Secretary of the Interior before they may tax non-Indians finds support in the statutory framework created by Title 25 of the United States Code. Title 25 accords to the Secretary vast powers over Indian affairs. It also imposes the requirement of Secretarial approval to all but the most trivial transactions with Indian tribes.

25 U.S.C. § 2 grants to the Secretary "the management of all Indian affairs and of all matters arising out of Indian relations." *See also* 25 U.S.C. § 9.

Every important facet of tribal life is subject to Secretarial approval. Contracts with Indian tribes are invalid unless they are approved by the Secretary of the Interior. 25 U.S.C. § 81. Membership rolls of Indian tribes must be approved by the Secretary of the Interior. 25 U.S.C. § 163. No one may trade with Indians without the approval of the Secretary of the Interior. 25 U.S.C. §§ 261, 262. Leases of tribal lands are invalid unless approved by the Secretary of the Interior. 25 U.S.C. § 396a, § 397, § 398, § 398a, § 399, § 415. Tribal timber may only be sold with the approval of the Secretary of the Interior. 25 U.S.C. §§ 406, 407. Certain tribes have been granted the authority to enact zoning, building and sanitary regulations, but only with the approval of the Secretary of the Interior. 25 U.S.C. § 416(h). The execution of mortgages or deeds of trust by Indian landowners is subject to the approval of the Secretary of the Interior. 25 U.S.C. § 483(a).

Congress recently authorized tribes to enter into agreements for the development of their mineral resources,

subject to the approval of the Secretary. 25 U.S.C. § 2102. And, Congress just authorized tribes to adopt land consolidation plans, only with the approval of the Secretary of the Interior. 25 U.S.C. § 2203(a).

While all would concede that a tribal power to tax non-Indians has greater implications than simple contracts, leases, and sales of timber have, it remains true that there is no federal statute which expressly requires Secretarial approval of tribal taxing measures. It would be anomalous if, without Secretarial approval, a tribe could impose a multi-million dollar tax on a non-Indian, and yet be required to obtain the Secretary's approval to even contract with that same non-Indian for a $10.00 item.

Congress' failure to address tribal taxation of nonmembers clearly reflects its understanding that Indian tribes were without such a power. *See Oliphant v. Suquamish Indian Tribe, supra,* 435 U.S. at 203. Unless *Merrion* is overruled by this Court, the solution to this problem is to be found in linking the tribal power to tax to Secretarial approval as a necessary implication of the Congressional scheme and as a necessary incident of the dependent status of Indian tribes.

B. *Secretarial approval of Navajo tribal taxing ordinances is required by the Navajo treaty.*

America's treaty with the Navajo Tribe strongly suggests that the Navajos have no power to tax non-Indians; but if they do, Secretarial approval is a necessary precondition for the exercise of the tribal taxing power. Treaty reliance is a hallmark of federal Indian law. Any fair reading of the four-page Navajo treaty suggests that General Sherman dictated its terms to a vanquished people. The treaty terminated the war between the parties, confined the Navajos to a reservation, and subjected them to the management of the agent of the United States.

Article IV of the treaty granted to the federal agent the power to inquire into complaints by or against Indians and decide disputes between the parties. II C. Kappler, *Indian Affairs, Laws and Treaties* 1016 (1904). Article XII(5) of the

treaty required the removal of the Navajo Tribe under the supreme control of the military commander of the Territory of New Mexico, and when completed, "the management of the tribe to revert to the proper agent." A fair reading of the treaty suggests that General Sherman did not believe he was leaving the Navajo Tribe with any residuum of sovereignty over non-Indians. He would have been greatly surprised to learn that the Navajos had the power to tax non-Indians.

But surprise or not, surely the treaty subjects the Tribe to the management of the federal agent. It would be anomalous indeed if the Tribe could tax non-Indians without the approval of that federal agent. While the Ninth Circuit purported to consider the treaty in connection with the Navajos' power to tax, 731 F.2d at 600, it failed to consider the treaty at all in connection with the claim that before such a tax could take effect, Secretarial approval was required.

CONCLUSION

Merrion was a jolt to American Indian law. If this Court chooses not to reverse it at this time, then it should find that Secretarial approval of tribal taxing measures is a necessary implication of the Congressionally created role of the Secretary over Indian affairs and a necessary incident of the dependent status of Indian tribes. In all events, the judgment of the United States Court of Appeals for the Ninth Circuit should be reversed.

Respectfully submitted,

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